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P-2782-12

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: RONALD J. BOSER
FOR: A REMOVABLE BRASSIERE CUP SUPPORT
SERIAL NO.: 09/944,612
FILED: September 4, 2001
EXAMINER: Gloria M. Hale, Primary Examiner, Art Unit 3765

Mail Stop Appeal Brief-Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Applicant requests reinstatement of the appeal and submits the accompanying Supplemental Appeal Brief.

SUPPLEMENTAL APPEAL BRIEF

1. Real Party in Interest

The applicant above named.

2. Related Appeals or Interferences

None.

3. Status of Claims

There is one claim on appeal as set forth in Appendix A.

4. Status of Amendments After Final Rejection

Not applicable.

5. Summary of Invention

The claim on appeal covers a brassiere that provides a user with two fashion options. As will be explained, one option is with firm underwire breast support and some attendant

discomfort, and the other with a “natural” look but which requires that the underwire support be removed.

In Fig. 1, there is shown a brassiere, generally designated 10, having right and left breast cups 12 and 14 worn by a user 16 with over the shoulder straps 18 and 20 positioning the brassiere cups in covering relation over her breasts 22 and 24, the use of Fig 1 being typical and one in which the user 16 will be understood to have exercised an option to have breast cup supports 26, often referred to in the parlance of the trade as underwires, although not confined to metal construction material. For its intended end use, each breast cup support 26 is of a U-shape as illustrated, and of U-shape-imparting construction material. The in-use option of Fig. 1 is one in which a strip of a VELCRO loop-type fastener 28 is attached by being sewn, as at 30, to a fabric U-shape trim 32, itself being sewn, as at 30, in encircling relation about the bottom of a cooperating breast cup 12, 14, in a central location, as illustrated.

Cooperating with the VELCRO loop-type fastener 28, and as best understood from Figs. 3 and 4, there is provided for each breast cup 12, 14, a fabric casing 36 in which there is disposed a shape-imparting support 38 in a U-shape, as illustrated, in assembled relation using a seam, as at 40, attaching also to the fabric casing 36 a strip of a VELCRO hook-type fastener 42 so that the VELCRO hook-type fastener 42 is in facing relation, as denoted by the dash lines 44, to the VELCRO loop-type fasteners 28 permanently sewn to the rear surface 46 of the brassiere 10. As understood, established contact of the strips of VELCRO loop-type fasteners 28 and VELCRO hook-type fasteners 42 with each other will hold throughout normal use of the brassiere 10 thus providing the user 16 with breast support.

The user 16, according to the present invention, also has the option of manually removing the VELCRO hook-type fastener 42 with its attached fabric-encased U-shape support 38 from its operative position occupied during its in-use condition of Fig 1 during which it was attached to

the VELCRO-loop type fastener 28. In practice, the wearing of the brassiere 10 without the breast supports 38 satisfies fashion demands and thus, the two options provided contribute to the utility of the brassiere 10.

As explained at application page 3, starting in line 5, "...it is an essential aspect of the invention that [it is the] VELCRO loop-type connection [that is] used on the back of the brassiere because the removal of the underwire exposes the closed ends or loops of this connector which, because they are not of a skin-sticking nature, are not a source of discomfort."

6. Issues pursuant to 37 CFR 1.192(e)(6).

A. Whether claim 1 is properly rejected under 35 U.S.C. § 112 for containing the trademark/trade name VELCRO;

B. Whether claim 1 is properly rejected under 35 U.S.C. 103(a) as being unpatentable over Fairbanks et al. (US 2,613,365) in view of the Gershman article "SELF-ADHERING NYLON TAPES" and Shimizu (JP 08158111); and

C. Whether claim 1 is properly rejected under 35 U.S.C. 102(b) as being anticipated by Shimizu, supra.

7. Grouping of Claims

Grouping does not apply.

8. Argument pursuant to 37 CFR 1.192(c)(8).

Issue A

The presence of the trademark VELCRO in the claim is not per se improper, as per MPEP 2173.05(u) first sentence, and applicant's use is in a manner which respects the proprietary nature of the trademark in that it is identified by capitalizing each letter of the mark followed by a generic designation as prescribed by MPEP 608.01(v) at page 600-69, left column, lines 9-13.

As explained at patent application page 4:

In the description which follows there is reference to the trademark VELCRO and this reference is being made within the scope of MPEP 608.01(v)(1) and intended to have a meaning which is sufficiently precise and definite to be made a part of a claim, it being understood that a loop-type VELCRO fastener is of a closed loop configuration and is comfortable to the touch, and a hook-type VELCRO fastener is of a hook configuration with an exposed point and thus is not comfortable to the touch.

It is respectfully requested that the objection to the claim under Section 112 be overruled.

Issue B

1. Preliminarily the below is to be noted:

Factual Assertions Disputed:

1. “The removal of the sheath (25) with the underwire by unsnapping is easier than removing the wire (36) from the sheath (25)”.

To replace by snapping, which of course must follow removal by unsnapping, the male and female snaps must be aligned and the male inserted under finger pressure within the female, and this is not easier than inserting the wire back into the sheath.

2. “Hook and loop fasteners were not available in 1949 and were not widely used at the time of filing of the Fairbanks et al. invention”.

There is no support for this in the record on appeal, and the Gershman article submitted on this point is misplaced.

2. On the merits:

On appeal is a claim reciting two wearing or fashion options for a brassiere. At application page 1, third paragraph, it is clearly stated:

“Underlying the present invention ... is the recognition that providing optimum support coincident with breast-supporting means is of course one option, but that providing nominal support

is also another option and satisfies fashion demands, as occurred during the no-bra fashion trend of former years.”

Fashion is clearly not in mind in Fairbanks et al. in the disclosure at col. 1, lines 3-7, 40-43 that the underwire 30 and sheath 25 can be removed for cleaning/laundrying and other purposes, the latter most likely being of a kindred nature to laundrying, such as ironing.

At col. 2, lines 1-10, the possibility of wearing a wired or a wireless brassiere is disclosed, but the wireless version is certainly attainable not by removal of the sheath/underwire assembly, but more simply by merely taking the underwire 30 out of the sheath 25 through the end opening through which the underwire central loop portion 31 projects upwardly and outwardly from the sheath 25 (at col. 3, lines 73, 74). The wearing of the brassiere with a wireless sheath is of questionable value as providing a simulated no-bra fashion appearance because of tell-tale bulk of the sheath still in place beneath the breast area of the garment front.

Fairbanks et al. is explicit in disclosing the use of male and female snaps for the attaching and removal function and it is the examiner not Fairbanks et al., who reads this disclosure in the patent as not being of any critical import but only as exemplary of what can be used for the conversion between wired and wireless versions. Thus the examiner has taken official notice that it is well known to substitute different types of fasteners for each other such as snaps for hook and loop fasteners, but it is otherwise disclosed in Fairbanks et al. as follows:

“This sheath assumes the same shape as tape 20 and it is provided with a plurality of male snap fastening members 26 spaced in accordance with the spacing of the female snap fastening members 21. It will be understood that these male and female snap fastening members are adapted to coact with each other so that the sheath may be detachably secured to the tape by means of said snap fastening members.

* * *

The snap fastening elements 26 are attached, however, to the tape material 27, since that is a stronger material and it faces the tape 20.” (at col. 3, starting in line 36)

Thus, in Fairbanks et al. not only is the disclosure explicit as to the use of male and female snaps, but the patentee provides explicit instructions as to how the male and female snaps are to be used.

As any user of the brassiere will attest, the aligning of the spaced apart male and female snaps, irrespective of where the female/male snaps are positioned, is considerably greater than attaching/removing face-to-face VELCRO loops and hooks, and thus involves a substantive matter unresolved by the examiner's Official Notice.

Applicant further argues that it must be conceded that VELCRO is a definite structural recitation. Thus, the remaining VELCRO loops on the brassiere "attached in an outwardly facing relation...and in an interposed position between said brassiere and an upper torso of a wearer of a brassiere" after the U-shape and fabric casing are removed, are claim structures not disclosed by Fairbanks et al. and, on the issue of anticipation, are limitations of a claim that must be considered.

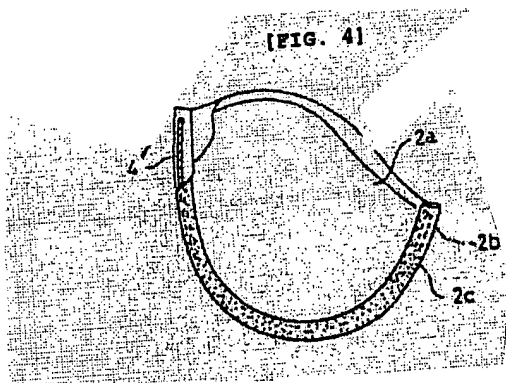
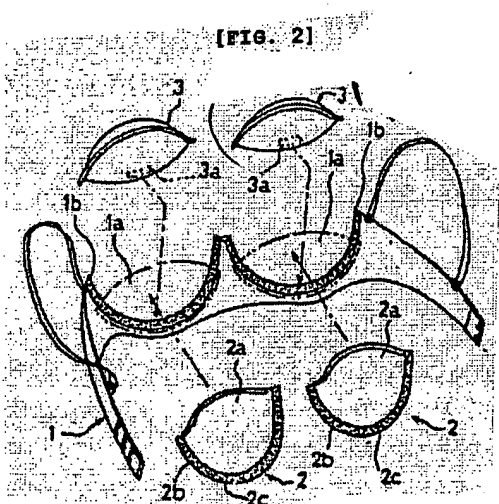
For the foregoing reasons, it is submitted that the claim on appeal is allowable over the cited Fairbanks et al. patent, and the secondary references cited therewith; the Shimizu reference cited under 102(b) in addition to 103(a), to be addressed in the subsequent argument which follows:

Issue C

Under 102(b), the examiner is held to the higher standard of anticipation, i.e., prior disclosure of each and every claim recitation, as contrasted to a rejection under 103(a), giving rise to the different, and some would argue, lesser standard of the claim recitations not being unobvious in view of the disclosures in a cited primary and secondary references considered in combination, the situation discussed in Issue B.

The constructions in Shimizu and that of applicant are totally different, and their only similarity is that they both involve a brassiere.

In applicant's construction, separate and apart from a pair of breast cups which remain an integral part of the brassiere, i.e., are structural components which are never detached from the front of the brassiere, applicant provides, for each breast cup, a cup support, namely a U-shape wire within a fabric casing. These cup supports are either attached in supporting relation about the bottom of a breast cup for uplift support or are removed therefrom, one reason for removal being to better permit the brassiere to be washed without the U-shape wire or for another reason to contribute to greater comfort in the wearing of the brassiere without the stiffness of the U-shape wire.



In what could not be a more contrasting construction is that of Shimizu. As clearly shown in Figs. 2 and 4, which for the Board's convenient reference are set forth to the left, these figures illustrate that in Shimizu the cups, not supports, are detachable, and attaching to the brassiere per se, and thus provides the wearing option to use substitute cups providing a better fit to the size of the wearer's breasts. The construction provides for an attachment to the brassiere per se, but not for a U-shape wire, but for the substitute cups in the spaces left unoccupied by removal of the original cups.

The attempted "reading" by the examiner on the claim is, at the onset, clearly in error because Shimizu does not disclosure structure for the use of breast cup supports (underlining added), but rather his disclosure is of structure for breast cup substitution, an entirely different end use.

The use of VELCRO for breast cup substitution does not anticipate breast cup support placement, even if the use of the VELCRO by happenstance is similar in the orientation of the hooks and loops in relation to the user's body.

In disregarding the claim recitations of structure not disclosed in Shimizu, the examiner is not following the mandate of In Re Hiniker Co., 150 F. 3d 1362, 1369, 47 USPQ 2d 1523, 1529 (Fed. Cir. 1998), i.e., the reference to the proposition "the name of the game is the claim", which appears on the cited page of Hiniker.

It is respectfully requested that the rejection of the claim on appeal be reversed.

Respectfully,

MYRON AMER, P.C.
Attorney for Applicant

By: Myron Amer
Myron Amer
Reg.No. 18,650

114 Old Country Road
Suite 310
Mineola, NY 11501
(516) 742-5290

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1. A construction for optional first and second uses of right and left breast cup supports for a brassiere attached in supporting relation respectively in surrounding relation about a bottom of a cooperating breast cup using VELCRO hook-type and VELCRO loop-type fasteners, said construction comprising for each breast cup a U-shape of shape-imparting construction material serving as each said cup support, a fabric casing in covering relation about said U-shape, a VELCRO hook-type fastener in a strip configuration attached to said fabric casing, and a VELCRO loop-type fastener in a strip configuration attached in an outwardly facing relation in an operative location in surrounding relation about a bottom of a cooperating breast cup and in an interposed position between said brassiere and an upper torso of a wearer of said brassiere, said strips of VELCRO hook-type and VELCRO loop-type fasteners in an exercise of a first option having operative positions in face-to-face contact with each other incident to providing breast cup support to said wearer of said brassiere, and whereby removal of said attached cup support in an exercise of a second option exposes said VELCRO loop-type attached strip which is characterized by a nominally felt presence to the touch contributing to comfort in the wearing of the brassiere.